Supreme Court, U.S.
FILED

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NO.

IN THE
Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

Petitioner,

v.

SEABOARD FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Organization for Competitive Markets, Inc. moved to intervene under Federal Rule of Civil Procedure 24(b) to vindicate its common-law right of access to court records that had been sealed pursuant to an agreed protective order in a commercial suit between two agribusiness competitors. Acknowledging a conflict with its sister circuits, the Eighth Circuit held that a nonparty's motion to intervene to gain access to court records does not present a question of law or fact in common with the main action. The Eighth Circuit affirmed the district court's denial of intervention, without considering whether petitioner had a right of access to the relevant court records. The question presented is:

Does an applicant for intervention raise a question of law or fact in common with the main action, as required for intervention under Federal Rule of Civil Procedure 24(b), when the applicant seeks to intervene to pursue its common-law right to obtain access to sealed court records?

CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of the Organization for Competitive Market, Inc.'s stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit summarily affirming the district court's decision is reproduced in the appendix at Pet. App. A1. The opinion denying rehearing en banc is reproduced in the Appendix at Pet. App. A7. The opinion of the district court is reproduced in the Appendix at Pet. App. A8. None of the opinions are reported.

JURISDICTION

The court of appeals entered judgment in this case on February 1, 2001. Petitioner filed a timely petition for rehearing en banc, which the court of appeals denied on March 20, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 24(b) provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

STATEMENT OF THE CASE

Petitioner Organization for Competitive Markets, Inc. ("OCM") seeks a writ of certiorari to challenge the Eighth Circuit's ruling that a nonparty seeking access to court records filed under seal pursuant to court order may be denied

intervention under Federal Rule of Civil Procedure 24(b), and thus effectively denied inquiry into the merits of the access claim, on the ground that the nonparty has not raised a question of law or fact in common with the main action. Because the ruling is at odds both with the decisions of eight other courts of appeals on precisely the same issue and with the decision of this Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court should grant review.

In this case, OCM, a nonprofit organization, seeks to intervene in a civil suit to obtain access to court records filed under seal pursuant to a protective order. Specifically, OCM seeks access to summary judgment exhibits and other records filed with the district court in a suit between Consolidated Nutrition Marketing Corporation ("Consolidated") and Seaboard Farms, Inc. ("Seaboard"). That suit, which has now been settled, involved allegations that Seaboard unlawfully engaged in unfair and unjustly discriminatory trade practices and gave unreasonable preference to particular localities in violation of the Packers and Stockyards Act, 7 U.S.C. §§ 181-231. The district court had jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 and 1332.

OCM was established in 1998 to promote fair and competitive markets for agricultural products and to protect those markets from abuse of power. As a result, OCM has a particular interest in investigating alleged violations of the Packers and Stockyards Act. To further its goals, OCM regularly monitors litigation between agribusinesses such as Seaboard and Consolidated concerning violations of that Act. OCM distributes reports on the issues raised in such litigation and provides public access to trial transcripts and other records from these actions. *See* <www.competitivemarkets.com>.

OCM was unable to obtain access to certain records filed with the district court in the litigation between Seaboard and Consolidated because, at the outset of discovery, the two companies stipulated to a protective order in which they agreed that documents and information produced during discovery and trial that either party believed to contain "trade secrets" or information "sensitive to the parties' business and/or affairs" would be deemed "confidential" and filed under seal. *See* Protective Order ¶ 1 (docket entry 25). The protective order gave the parties complete discretion to designate documents as "confidential" without review or approval by a court. *Id.* ¶¶ 1, 2, 4. The protective order was signed by the magistrate judge, despite the parties' failure to provide any evidence to support the sealing of records, and despite the magistrate judge's failure to make any findings that there was "good cause" for the protective order, as required by Federal Rule of Civil Procedure 26(c).

Consolidated and Seaboard filed numerous documents with the district court under seal. For example, Consolidated filed papers in support of its motion for partial summary judgment under seal, and Seaboard filed an opposition to that motion that included records filed under seal. *See* Docket Entries 188, 244, 245. These court filings were the basis for the district court's decision on February 7, 2000, denying Consolidated's motion for partial summary judgment and granting in part and denying in part Seaboard's motion for partial summary judgment. *Consolidated Nutrition Marketing Corp. v. Seaboard Farms*, 2000 U.S. Dist. LEXIS 1173 (D. Neb. Feb. 7, 2000). Because the court records to which OCM seeks access were the basis for the district court's rulings on substantive matters in the case, they should not remain under seal absent "the most compelling reasons." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *see also Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

The trial between Seaboard and Consolidated commenced on March 7, 2000 and ended eight days later, when the parties agreed to a settlement. Although the trial had not been closed to the public, Seaboard requested that the trial transcript be sealed. In May 2000, OCM sought to review the trial transcript but was informed by court personnel that the entire transcript was sealed pending resolution of Seaboard's request to designate portions of the transcript as confidential. *See* OCM's Brief in Reply in Support of Motion to Intervene at 4 (docket entry 388). On June 2, 2000, OCM filed a motion to intervene "for the limited purpose of opposing [Seaboard's] request that certain portions of the trial transcript be designated confidential and filed under seal, and seeking public access to documents, evidence, information, and other things currently deemed confidential in this case." *Id.* at 1. With its motion to intervene, OCM also filed an opposition to Seaboard's motion to seal the trial transcript and a motion seeking to modify the protective order to unseal records filed with the court. Only Seaboard filed an opposition to OCM's motions.

The district court denied OCM's motion to intervene, in part because it concluded that OCM's challenge to the protective order did not raise questions of fact or law in common with the main action. *Consolidated Nutrition Marketing Corp. v. Seaboard Farms,* 2000 U.S. Dist. LEXIS 12526 at *12-*17 (D. Neb. Aug. 28, 2000) (Pet. App. A18-A19). The district court recognized that "[n]ot all courts require a tight nexus of fact and law when an individual seeks permissive intervention only to modify a protective order." *Id.* at *16 (Pet. App. A18). However, the court refused to adopt a "relaxed standard of commonality." *Id.* at *17 (Pet. App. A18). As a result, the district court did not reach the merits of OCM's motion to modify the protective order. The district court did not explain how a nonparty could ever challenge the parties'

agreement to seal court records if a nonparty cannot intervene to protect this interest.[1]

OCM appealed the district court's denial of OCM's motion to intervene and motion seeking to vacate or modify the protective order. Only Seaboard appeared to defend the appeal.

On February 1, 2001, the Eighth Circuit summarily affirmed the district court's denial of OCM's motion to intervene, in a brief unpublished opinion. The Court concluded that Rule 24(b)'s requirement that the putative intervenor raise an issue of law or fact in common with the main action barred OCM's motion because "the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order." Pet. App. A5. In so holding, the panel expressly noted and rejected the conclusion of its sister circuits that nonparties may intervene solely for the purpose of seeking access to court records. *Id.* Like the district court, the panel did not address the obvious consequences of its ruling: that denial of intervenor status effectively prohibits nonparties from vindicating their common-law right of access to court records. *See, e.g., Nixon*, 435 U.S. at 597. OCM filed a motion for rehearing en banc that was denied on March 20, 2001.

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[1] Although the district court did not address the merits of OCM's motion to modify the protective order to unseal records filed under seal, it did reject Seaboard's request that the trial transcript be sealed because it was not persuaded that disclosure would cause Seaboard competitive harm. *Id.* at *19 (Pet. App. A19-A21).

REASONS FOR GRANTING THE WRIT

The panel's decision that nonparties may not intervene to seek access to court records conflicts with the decisions of the eight circuit courts that have addressed this issue, all of which have concluded that intervention is the appropriate method for a nonparty to challenge protective orders. Moreover, because the panel's decision effectively bars nonparties from obtaining access to court records under seal, it conflicts with decisions of this Court recognizing the public's common-law right of access to such records.

A. THE EIGHTH CIRCUIT'S DECISION CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

Aside from the Eighth Circuit, "every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *E.E.O.C. v. National Children's Center, Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (gathering cases). These circuit courts grant nonparties intervenor status even when the nonparties seek to intervene solely to obtain access to court records, and thus raise no issue of fact or law relating to the merits of the litigation.[2] Indeed,

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[2] *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988) (permitting intervention of public health organizations interested solely in obtaining access to documents concerning safety of cigarettes); *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995) (permitting intervention of newspaper interested solely in obtaining access to court officer's report); *In re "Agent Orange" Product*

(continued...)

the individuals seeking access to court records are frequently members of the media, who have no personal stake in the underlying litigation but nonetheless are permitted to intervene to argue in favor of public access to records. *See supra* note 2.

The district court held that nonparties can never intervene for the sole purpose of seeking access to sealed court records, on the theory that the interest of nonparties in obtaining access to such records does not raise a question of law or fact in common with the main action, as is required to intervene under Rule 24(b). *See* Pet. App. A18. The Eighth

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[2](...continued)
Liability Litig., 821 F.2d 139, 141 (2d Cir. 1987) (permitting intervention of Vietnam Veterans of America interested solely in obtaining access to discovery materials); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994) (permitting intervention of newspaper interested solely in obtaining access to court records); *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (permitting intervention of newspaper interested solely in obtaining access to court records); *Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 923 (5th Cir. 1996) (permitting intervention of news organizations interested solely in seeking access to information about litigation); *In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 471 (6th Cir. 1983) (permitting intervention of newspapers interested solely in obtaining access to court records); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (permitting intervention of newspaper interested solely in challenging order sealing settlement agreement); *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1327 (D.C. Cir. 1985) (permitting intervention of newspaper reporters interested solely in unsealing court records).

Circuit agreed and, like the district court, rejected the conclusion that the "scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action." Pet. App. A5 (quoting and citing cases from other circuits with which it disagreed). According to the Eighth Circuit, nonparties without a stake in the underlying litigation—such as newspapers, journalists, and public interest organizations like OCM—are never permitted to intervene to challenge protective orders barring public access to judicial documents and proceedings.

As the panel acknowledged, its decision conflicts with decisions of those of its sister circuits who "'have gone so far as to hold that the issue of the scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action.'" Pet. App. A5 (quoting *E.E.O.C.*, 146 F.3d at 1047). For example, in *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000), the Seventh Circuit permitted a newspaper to intervene in an employment dispute solely for the purpose of contesting the district court's decision to seal the settlement agreement negotiated by the parties. That court noted that "although there is ample justification for the common fact or law requirement when the proposed intervenors seek to become a party to the action, 'there is no reason to require such a strong nexus of law or fact when a party seeks to intervene only for the purpose of modifying a protective order.'" *Id.* (quoting *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992)). Likewise, in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994), the Third Circuit held that a newspaper was permitted to intervene to challenge a confidentiality order, even though it only wished to report on the litigation, not become a party to it.

Indeed, OCM is aware of only one other decision denying a nonparty intervention to seek access to court records, and that decision is also from the Eighth Circuit. In *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990), the Eighth Circuit affirmed without discussion the district court's denial of Pulitzer's motion to intervene to seek access to court records and proceedings. The panel in the case at bar did not cite *Webster Groves* as the basis for its summary affirmance. Nonetheless, like any other Eighth Circuit panel, it is bound by *Webster Groves* to affirm all future denials of intervention motions when the sole purpose for intervening is to gain access to court records. In sum, the conflict between Eighth Circuit law and the law of other circuits warrants this Court's review. [3]

B. THE EIGHTH CIRCUIT'S DECISION IS AT ODDS WITH THIS COURT'S DECISIONS RECOGNIZING A COMMON-LAW RIGHT OF ACCESS TO COURT RECORDS.

The Eighth Circuit's decisions denying intervenor status to nonparties effectively bars nonparties from seeking access to

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[3] The panel's summary affirmance is unpublished, rendering the decision of questionable precedential value. *See* 8th Cir. R. 28A(i). However, the panel's express recognition that it was deviating from the decisions of its sister circuits, the Eighth Circuit's decision to deny rehearing en banc, together with the Eighth Circuit's previous denial of intervention in *Webster Groves* all indicate that the Eighth Circuit will routinely affirm district court decisions denying intervention in access to court records cases on the ground that the applicant for intervention has not raised a question of fact or law in common with the main action.

judicial records. Thus, the Eighth Circuit's rulings are incompatible with the decisions of this Court recognizing a common-law right of access to such records.

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court declared that "[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597 (footnotes omitted). The right of access to court records, like the right to observe trials, serves to enhance the basic fairness of the proceedings and safeguards the integrity of the factfinding process. *See Press-Enterprise v. Superior Court*, 464 U.S. 501, 508 (1984); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982). That right has never been limited by this Court to only those few individuals who have a personal stake in the merits of the underlying litigation. Indeed, had this Court intended to so limit the right of access, it would have denied access to the members of the media in the above-cited cases.[4]

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[4] Moreover, the public also may have a First Amendment right to obtain access to court records in civil cases. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980), the Supreme Court held that there is a First Amendment right of public access to attend criminal proceedings that may only be overcome by a compelling governmental interest. *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-10 (1986). This Court has not yet addressed whether the First Amendment right of access applies to civil proceedings. However, in determining whether the First Amendment right of access extends to a particular type of proceeding, this Court considers "whether the place and process have historically been

(continued...)

For the common-law right of access to court records to have any meaning, members of the public must be permitted to intervene so that they can vindicate that right. In a recent decision, the Seventh Circuit has recognized the necessary link between the right to intervene and the right of access to court records:

> In order to preserve the right of access, those who seek access to [sealed] material have a right to be heard in a manner that gives full protection to the asserted right. Representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion from the proceedings or access to the documents. Thus, we have recognized intervention as the logical and appropriate vehicle by which the public and press may challenge a closure order. This method not only

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[4](...continued)
open to the press and general public," and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.*, 478 U.S. at 8. Extrapolating from those criminal cases, numerous courts have concluded that a First Amendment right of access also applies to certain judicial records and documents in civil cases, because "'historically both civil and criminal trials have been presumptively open.'" *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 253 & n.4 (4th Cir. 1988); *see also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1177-80 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

> guarantees the public's right to be heard, it also ensures that the issue [of closure will] be examined in a procedural context that affords the court an opportunity for due deliberation.

Jessup, 227 F.3d at 997.

Courts not only recognize intervention as an appropriate vehicle through which nonparties can seek to obtain access to court records, they consider it the exclusive method by which nonparties can do so. *See, e.g., Jessup*, 227 F.3d at 997 ("It is apparent . . . that intervention is the procedurally appropriate course for third-party challenges to protective orders.") (quotation and citation omitted); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) ("[W]e are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion."); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (holding that intervention is "the procedurally correct course" for nonparty challenges to protective orders). Thus, the panel's decision barring nonparties from intervening effectively prevents nonparties from seeking to unseal court records. Review is warranted here because, absent action by this Court, nonparties in the Eighth Circuit will be denied any means by which to vindicate their common-law right of access to court records.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court should summarily reverse the decision below or set the case for plenary review.

May 1, 2001

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United States Court of Appeals
For The Eighth Circuit

No. 00-3432

Consolidated Nutrition Marketing Corporation,
Plaintiff,

Organization for Competitive Markets, Inc.,
Movant-Appellant,

v.

Seaboard Farms, Inc.,
Defendant-Appellee.

Seaboard Farms, Inc.,
Plaintiff-Appellee,

v.

Consolidated Nutrition, L.C.,
Defendant.

Organization for Competitive Markets, Inc.,
Movant-Appellant.

Appeal from the United States District Court
for the District of Nebraska

Filed: February 1, 2001

Before McMILLIAN, LOKEN and HANSEN, Circuit Judges.

PER CURIAM.

The Organization for Competitive Markets, Inc. (OCM), appeals from an order entered in the District Court[1] for the District of Nebraska denying its motion for permissive intervention for the limited purpose of obtaining access to materials covered by a protective order and the related motion to vacate or modify the protective order. *Consolidated Nutrition Marketing Co. v. Seaboard Farms Inc.*, No. 8:98CV407 (D. Neb. Aug. 28, 2000) (order). For the reasons discussed below, we summarily affirm the order of the district court.

The underlying litigation between Consolidated Nutrition Marketing Corp. (Consolidated) and Seaboard Farms, Inc. (Seaboard), involved breach of contract and tort claims. The parties stipulated to a protective order to protect from disclosure certain materials, including but not limited to items produced during discovery, evidence, and pleadings, which any party deemed to be confidential, contain trade secrets or include information sensitive to the parties' business. Pretrial hearings and the trial itself were not closed to the public. The trial began on March 7, 2000, and ended on March 16, 2000, just as Consolidated closed its case-in-chief, because the parties had settled the case. On April 3, 2000, the district court granted the parties' stipulated motion to dismiss with prejudice.

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[1]The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

On June 2, 2000, OCM filed its motion for permissive intervention for the limited purposes of opposing Seaboard's motion to seal certain portions of the trial transcript and to obtain access to materials covered by the protective order in order "to make available to 'farmers, ranchers, policy makers and the general public' information affecting the marketing of livestock and to 'refine public knowledge about the meatpacking industry.'" *Id.* at 6 (citing OCM's brief supporting the motion to intervene at 2). OCM describes itself as "a non-profit organization established in 1998 that seeks to reestablish fair and competitive markets for agricultural products and to protect those markets from any abuse of power." *Id.* at 5 (citing OCM's brief supporting the motion to intervene at 2).

The district court denied the motion for permissive intervention because OCM did not have standing, *id.* at 7, and there was no claim or defense that raised a common question of law or fact. *Id.* at 9. The district court noted that OCM's motion for permissive intervention raised public interest and First Amendment issues, while the underlying litigation was a lawsuit between two businesses over breach of contract and tort claims. *Id.* The district court also found that the motion for permissive intervention was timely filed. *Id.* at 8. The district court then denied as moot OCM's motion to vacate or modify the protective order as moot. The district court also denied as moot OCM's motion to prohibit the withdrawal or destruction of trial exhibits, denied Seaboard's motion to seal as confidential certain portions of the trial transcript and modified the protective order to exclude testimony given in open court during the trial.

OCM filed a timely notice of appeal from the district court order denying its motion for permissive intervention and to vacate or modify the protective order. Seaboard filed a

motion for summary disposition of the appeal in its favor; OCM filed a response and Seaboard a reply.

First, this appeal is not moot. OCM did not appeal the district court order denying as moot its motion to prohibit the withdrawal or destruction of trial exhibits. According to the notice of appeal and appeal information form, OCM designated as issues on appeal the district court order denying its motion for permissive intervention and to vacate or modify the protective order. Those parts of the district court order were not made moot by the return of the trial exhibits to the parties after the case was settled, a fact which we would agree would make moot an appeal from that part of the district court's order. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (lst Cir. 1988) (noting that trial exhibits returned to parties after case has completely terminated are no longer judicial records within supervisory power of district court and may be destroyed), *cert. denied*, 488 U.S. 1030 (1989).

We review the district court order denying the motion for permissive intervention for abuse of discretion. Fed. R. Civ. P. 24(b) (district courts "may" allow intervention if requirements of rule are met); *see e.g., EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1048,333 U.S. App. D.C. 101, 107 (1998); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66,73 (2d Cir. 1994) (noting reversal of denial of motion for permissive intervention is "very rare"). We cannot say that the district court abused its discretion in denying the motion for permissive intervention.[2] We agree with the district court that

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[2]We need not decide whether a third party seeking permissive intervention for the limited purpose of obtaining access to materials covered by a protective order must have

OCM failed to raise a claim or defense that shared a common question of law or fact with the underlying litigation. We decline to adopt the position of those "courts [which] have gone so far as to hold that the issue of the scope or need for the confidentiality order itself presents a common question that links the movant's challenge with the main action." *EEOC v. National Children's Center, Inc.*, 146 F.3d at 1047, 333 U.S. App. D.C. at 106, *citing Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-78 (3d Cir. 1994) (holding commonality requirement is satisfied whenever a third party objects to a confidentiality order). Here, the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order. *Compare id.*, 146 F.3d at 1047-48, 333 U.S. App. D.C. at 106-07 (noting both suits were brought against same defendant based on acts of sexual misconduct allegedly committed by defendant's employees during roughly same period of time); *Beckman Industries Inc. v. International Insurance Co.*, 966 F.2d 470, 474 (9th Cir.) (noting interpretation of insurance policies in

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standing. *See Planned Parenthood of Mid-Mo. & E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 n.2 (8th Cir. 1998) (listing cases). *But cf. EEOC v. National Children's Ctr., Inc.*, 146 F.3d 1042, 1046-47, 333 U.S. App. D.C. 101, 105-06 (1998) (noting permissive intervention requires independent basis for jurisdiction but that "courts have crafted a narrow exception for the limited purpose of obtaining access to documents protected by a confidentiality order" because "such intervenors do not ask the district court to exercise jurisdiction over an additional claim [or defense] on the merits, but rather to exercise a power that it already has, namely the power to modify a previously entered confidentiality order") (citations omitted).

district court action and state court actions satisfied commonality requirement), *cert. denied*, 506 U.S. 868 (1992).

We hold that the district court did not abuse its discretion in denying OCM's motion for permissive intervention because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation. Accordingly, we summarily affirm the order of the district court.

A true copy.

Attest: Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3432

Organization for Competitive Markets, Inc., et al.,

Appelant,

v.

Seaboard Farms, Inc.,

Appellee.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

March 20, 2001

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Consolidated Nutrition Marketing Corp.,
Plaintiff,

vs.

Seaboard Farms, Inc., and Seaboard Corporation,
Defendant.

Seaboard Farms, Inc.,
Plaintiff,

vs.

Consolidated Nutrition, L.C., et al.,
Defendants.

Case No. 8:98CV407
consolidated with
Case No. 8:99CV175

ORDER

Before me are three motions filed by the Organization for Competitive Markets (OCM): 1) a motion (Filing Nos. 382 and 288)[1] to intervene; 2) a motion (Filing Nos. 390 and 297) to prohibit the withdrawal or destruction of exhibits; and 3) a

---

[1]The first filing number shall hereafter refer to case number 98CV407 and the second to case number 99CV175.

motion (Filing Nos. 391 and 296) to vacate or modify the magistrate's earlier protective order (Filing No. 25)[2] OCM supports its motions with briefs and indexes of evidence (Filing Nos. 383 and 392; 289 and 298). Seaboard opposes the motions with briefs and indexes of evidence (Filing Nos. 387 and 393; 293 and 299). Consolidated did not respond to OCM's motions or to Seaboard's briefs.

I also have before me Seaboard's designations of those portions of the trial transcript it believes should be sealed as confidential pursuant to the parties' stipulated protective order (Filing No. 25). A copy of Seaboard's proposed order setting out the designations is attached to this order as Appendix 1. Consolidated made no designations of its own and did not object to Seaboard's designations.

In the protective order at issue here, Consolidated and Seaboard agreed that

> certain documents, information or things which will be produced during discovery or otherwise contain sensitive and private marketing, business or other proprietary information, the disclosure of which to the other party could give that party a competitive, business or other advantage, or which could be otherwise detrimental to the business interests of the producing party.

---

[2]Magistrate Judge Thalken entered the protective order in 98CV407 on January 13, 1999. 99CV175 was not filed until May 1999, so no separate protective order was entered in that case.

Filing No. 25 at 1, ¶ 2. They agreed that the scope of the protective order would include

> (i) certain documents, information and things which will be produced during discovery, or produced pursuant to a subpoena *duces tecum* or otherwise, (ii) evidence which will be adduced prior to or at the time of trial and portions of testimony to be taken (whether at deposition, hearing or trial), (iii) pleadings, affidavits, briefs, motions, transcripts and other writings which are or may be filed and (iv) various other matters which include, but are not limited to, information which any party may deem confidential, contain trade secrets or include information sensitive to the parties' business and/or affairs and shall be entitled to protection against disclosure pursuant to this Protective Order.

Id. at 1, ¶ 1. The remainder of the order described how the parties were to designate, utilize, and safeguard information or documents subject to the order which were produced during discovery. Whether marked "Confidential" or "For Counsel's Eyes Only," information or documents were to be used "only for purposes of this litigation and may not be used for any purpose outside the reasonable conduct of this case." *Id.* at 5, 6, ¶¶ 6(a), 7(a).

The order did not specifically discuss how the parties would handle information or documents subject to the order when incorporated into an exhibit or otherwise used during a hearing or at trial apart from the general language referring to "transcribed hearings, transcribed files, deposition testimony or affidavit."

> 4. If a party determines that a document or thing of any description to be furnished, produced, or made a part of any pleadings or papers to be filed, or any briefs, testimony, affidavits and/or evidence to be offered, contains or may contain information which that party believes to be proprietary or confidential pursuant to Paragraph 1 of this Protective Order, the party requesting protection shall designate such document, testimony or affidavit as "Confidential" in the following manner:
>
> . . . .
>
> (d) In the case of transcribed hearings, transcribed files, deposition testimony or affidavit, by advising the other party in writing of the witness whose testimony is to be deemed confidential.

Id. at 3-4, ¶ 4(d).

The parties did not decide whether the protective order would have continuing effects at the termination of the trial other than to agree that the protective order would be binding on "the parties, their attorneys, agents, employees, representatives, successors and assigns," *Id.* at 8, ¶ 11, and that within thirty days "after the final determination of this action, each party to the litigation and its attorneys shall assemble and return to the producing party or parties the originals and all copies of documents produced in discovery designated by the producing party as "Confidential" or "For Counsel's Eyes Only." *Id.*, ¶ 10. The courtroom deputy has returned all trial exhibits to the parties, Filing Nos. 393 and 299, Seaboard's Index of Evidence Opposing Motion to Prohibit Withdrawal or Destruction of Exhibits, Aff. of B. Gassaway at 2, ¶ 2.

Significantly, the parties agreed that the court could modify the protective order "at any time on its own motion." *Id.*, ¶ 9.

Neither party used the protective order as the basis for a motion to close the courtroom during pretrial hearings or the trial itself. The parties tried the case to a jury in open court beginning on March 7, 2000. On March 13, 2000, I held the following colloquy with counsel:

> THE COURT: I've been informed that the lawyers need to talk to me. Who needs to talk first?
>
> MR. McLEAY: I was going to offer an issue to the court having to do with the protective order in this case.
>
> We have a protective order that prescribes any testimony treating to confidential documents and confidential documents themselves would be protected.
>
> We kept pretty close tabs of who has been in the courtroom and know there have been no witnesses, I know there was a reporter briefly to describe the situation, but there has been no access to the confidential documents.
>
> All I wanted to do was at this time, I guess, for the record, to say pursuant to paragraph 4(d) of the protective order that was entered, that with respect to the testimony of Mr. Brock, Mr. Treiber and Mr. Croucher, to the extent that that testimony concerned kill sheets and exception reports, that's what we have declared as confidential in the lawsuit.
>
> And we will advise the court specifically of both the testimony by page and line, if necessary, as well as the specific exhibits that would be at issue in this case,

and we'll do that by correspondence to the court as we go along, at the end of the case, or however the court would like that, we would be happy yo do that. We would like to keep the protection order.

So you have an understanding of the flavor as to why, the kill sheets, for example, contains pricing information.

If our producers know that pricing information, they can use that potentially against us in some way during negotiations.

THE COURT: Mr. Dahlk?

MR. DAHLK: Your Honor, we object to that. I don't know how to comply with something that is in open court and testified to.

I stipulated early in this case to that protective order, thinking that the burden was on them to keep proving the confidentiality of information, and apparently it wasn't, and I was wrong, I don't want to have that situation again.

THE COURT: What situation?

MR. DAHLK: The situation where we have testimony in open court and somehow we are in supposed violation of a protective order that is ridiculously broad.

THE COURT: Well, I don't want to limit the evidence in any way as far as the open court is concerned.

If there is some proprietary interest that Seaboard wants to protect, then at the conclusion of the

> trial you can present those portions of the record that you think are confidential and should be sealed and we'll go from there.
>
> MR. McLEAY: We will do just that, Your Honor.
>
> THE COURT: Is that acceptable to you, Mr. Dahlk?
>
> MR. DAHLK: That great, Your Honor. Thank you.

Filing No. 378E, Transcript, 549:3-551:3.

The trial ended on March 16, 2000, just as Consolidated closed its case-in-chief. On April 3, 2000, I granted (Filing Nos. 380 and 286) the parties' stipulated motion (Filing Nos. 379 and 285) to dismiss with prejudice. On May 3, 2000, I ordered (Filing Nos. 381 and 287) the parties to designate for my review those portions of the trial transcript which they believed should be sealed as confidential. Seaboard submitted its designations by letter and a proposed order on May 22, 2000.

OCM's motion to intervene followed on June 2, 2000. OCM describes itself as "a non-profit organization established in 1998 with a mission to reestablish fair and competitive markets for agricultural products; and to protect those markets from any abuse of power." OCM's Brief Supporting Motion to Intervene at 2. OCM seeks to intervene "for the limited purposes of opposing [Seaboard's] request that certain portions of the trial transcript be designated confidential and filed under seal, and seeking public access to documents, evidence, information, and other things currently deemed confidential in

this case." Filing Nos. 382 and 288, OCM's Motion to Intervene, at 1. By OCM's count, Seaboard's designations touched 433 pages of the approximately 1100 pages of transcript and an unknown number of trial exhibits discussed in those pages. OCM's Brief in Support of Motion to Vacate or Modify Protective Order at 3. OCM states that its motivation for seeking access to the trial transcript in this case is to make available to "farmers, ranchers, policy makers and the general public" information affecting the marketing of livestock and to "refine public knowledge about the meatpacking industry." OCM's Brief Supporting Motion to Intervene at 2.

I have reviewed the record, the trial transcript, the parties' briefs and indexes of evidence, and the applicable law, and I conclude that OCM's motions should be denied.

Motion to Intervene

Any person may timely apply for permission to intervene in an action when the "applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). A trial court will deny an application to intervene if "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* Rule 24 is to be "liberally construed, and doubts should be resolved in favor of allowing intervention." *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985) (citations omitted).

OCM does not seek to litigate any of the underlying claims in this case, but only to challenge the breadth of the protective order under which Seaboard asks me to seal portions of the trial transcript. Therefore the primary issues in this motion are whether OCM has Article III standing to intervene

permissively, whether the motion is timely, and whether OCM can show a commonality of law or fact between the underlying case and its application.

Standing. While "Article III standing is a prerequisite for intervention in a federal lawsuit," *Curry v. Regents of the Univ. of Minn.*, 167 F.3d 420, 422 (8th Cir. 1999) (*quoting Standard Htg. & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 570 (8th Cir. 1998)), OCM argues that in the Eighth Circuit an intervenor must meet the standing requirement only if seeking to intervene as a matter of right under Rule 24(a) and only if it intends to litigate the merits of the case. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

It is not entirely clear whether the Eighth Circuit also requires Article III standing for permissive intervention under Rule 24(b) when the intervenor seeks only to challenge a protective order issued in the underlying action. Some circuits have ruled that a motion for permissive intervention under Rule 24(b) is the proper method for a nonparty to challenge a protective order. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988). In those jurisdictions, strict standing is not required. *See, e.g., Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992). *See also Planned Parenthood of Mid-Missouri and E. Kansas, Inc. v. Ehlmann*, 137 F.3d 573, 577 n.2 (8th Cir. 1998) (listing cases from circuits that do and do not requiring standing for intervention). While OCM does not seek substantive relief from either Seaboard or Consolidated, instead asking the court only to modify the protective order, OCM nevertheless fails to provide any Eighth Circuit authority to soften the circuit's apparently absolute rule with regard to standing to intervene under Rule 24.

In any event, OCM cannot meet the traditional standing requirements. OCM cannot show an "imminent and direct" injury in fact, *Mausolf v. Babbitt*, 85 F.3d at 1301; 2) a causal connection between the injury and the conduct complained of, *Planned Parenthood of Mid-Missouri and E. Kansas, Inc. v. Ehlmann*, 137 F.3d at 577 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)); and 3) redressability, *id.* I find, therefore, that OCM lacks Article III standing to intervene.

Timeliness. The trial court has the discretion to determine whether a motion to intervene under Rule 24 is timely. *Arkansas Elec. Energy v. Middle South Energy, Inc.*, 772 F.2d at 403 (*citing NAACP v. New York*, 413 U.S. 345, 365-66, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973)). The decision is based on all the circumstances, but the court should pay "particular attention" to the stage of the proceedings at which the movant seeks to intervene, the prejudice the parties might suffer because of delay, and the reason for the delay. *Id.* (*quoting Nevilles v. Equal Employment Opportunity Comm'n*, 511 F.2d 303, 305 (8th Cir. 1975)).

The fact that this case has settled does not make OCM's motion untimely. "Intervention has been allowed even after judgment has been entered." Id. (citing *Liddell v. Caldwell*, 546 F.2d 768 (8th Cir. 1976)). OCM could not have known that Seaboard would seek to use the protective order to seal substantial portions of the trial transcript until Seaboard actually made its designations and requested an order to seal. OCM filed its motion within two weeks of the court's receipt of Seaboard's designations, and OCM's object in filing the motion will be met when a ruling on Seaboard's pending designations is issued. The parties therefore will not suffer any prejudice by my

consideration of OCM's motion to intervene in conjunction with Seaboard's designations.

Commonality of Law or Fact. Not all courts require a tight nexus of fact and law when an individual seeks permissive intervention only to modify a protective order. For example, insureds suing their insurer in state court over the scope of the insurer's policies were allowed to intervene in an already settled and dismissed federal action between another insured and the same insurer. To allow the insureds access to six depositions transcripts, the federal court modified a protective order that had made all discovery material confidential. The issue of the interpretation of the insurer's policies "supplied a sufficiently strong nexus between the district court action and the state actions to satisfy the commonality requirement." *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d at 474. The court did not require the intervenors' claim to involve the same clause of the policy or the same legal theory because the intervenors were not becoming parties to the underlying litigation.

OCM suggests that such a relaxed standard of commonality should apply here. It contends that the common questions of law or fact which its intervention action shares with the underlying action between Seaboard and Consolidated are 1) whether the trial transcript can be sealed in accordance with the common law and First Amendment rights of access to judicial records, and 2) whether the parties made a showing of good cause sufficient to allow entry of a protective order under Rule 26(c). OCM's Brief in Support of Motion to Intervene at 4.

I find that the underlying action and OCM's motion to intervene share no common questions of law or fact. The public

interest/First Amendment issues OCM puts forward to justify its intervention were never raised or even considered in the underlying business litigation for breach of contract and tort claims except implicitly and in a negative way: Consolidated and Seaboard stipulated that certain documents and information disclosed during discovery should be kept confidential to shield sensitive business records and secrets from the scrutiny of competitors and the general public. The situation here thus differs from that in *Beckman Industries* because there the two actions shared a substantive issue: how insurance policies should be interpreted.

Accordingly, because OCM lacks Article III standing and cannot establish a commonality of law or fact, OCM's motion to intervene is denied.

Motion to Vacate or Modify the Protective Order

OCM also requests that I modify or vacate the protective order (Filing No. 25). Since I have ruled that OCM lacks standing to intervene, I will deny its motion as moot.

Motion to Prohibit Withdrawal or Destruction of Exhibits

Likewise, OCM's lack of standing requires that I deny as moot its motion to prohibit the withdrawal or destruction of exhibits.

Seaboard's Designations

Seaboard seeks to seal a large portion of the trial transcript because testimony or exhibits allegedly dealt with confidential business information or documents produced pursuant to a broad pretrial protective order.

I have reviewed those portions of the trial transcript which Seaboard seeks to seal. Most of the designated testimony and exhibits concerned Seaboard's contract with Consolidated, described Seaboard's personnel and operations at its Guymon, Oklahoma hog processing facility -- admittedly not always in flattering terms -- or examined the raw data on kill sheets, exception reports, and other documents generated in Seaboard's processing of Consolidated's hogs. The testimony and exhibits focused on the commercial relationships among Seaboard, Consolidated, and the hog producers who supplied Consolidated. The testimony and exhibits simply did not reveal trade secrets or other information the disclosure of which could give another entity a competitive business or other advantage over Seaboard.

Despite the seemingly encompassing language of the parties' stipulated protective order, the order did not specifically provide how materials designated as confidential would be introduced at trial or in exhibits. *Cf.* Imageware, Inc. v. U.S. West Communications, 2000 WL 1015865 at *2 (8th Cir. 2000) (parties' protective order included a paragraph detailing treatment of confidential information used at trial). As a result, supposedly confidential materials were introduced and admitted into evidence in open court without any precautions being taken to protect their confidential nature. Any interest in their confidentiality as trade secrets was therefore diminished, if not eliminated.

All the testimony in this case took place in open court without objection from Seaboard. As the colloquy quoted above indicates, counsel for Seaboard raised the possibility that some testimony and exhibits might be covered by the protective order only on the fifth day of the trial. Granting protection to

materials only after they have become part of an open trial record would contravene the integrity of the judicial process.

Since this case settled, several parties in addition to OCM have sought access to this transcript for a variety of reasons. Some of these requests are based on actual litigation against Seaboard, such as the most recent request from the Nebraska Attorney General in connection with a state action filed against Seaboard in Antelope County District Court in Nebraska. *See* Attachment B. Other requests have been based on similar suits against other processors or on potential litigation against Seaboard itself. The public thus has a heightened interest in the subject matter of this litigation which is sufficient to override Seaboard's claimed interest in the secrecy of the trial transcript.

I therefore will not seal those portions of the transcript which Seaboard has designated as confidential. Pursuant to paragraph nine of the protective order, I modify the protective order but only to the extent that the testimony given in open court during the trial of this case is removed from its coverage. The remainder of the protective order shall continue in full force and effect.

IT IS THEREFORE ORDERED that

1. The motion (Filing Nos. 382 and 288) filed by the Organization for Competitive Markets to intervene is denied.

2. The motion (Filing Nos. 390 and 297) filed by the Organization for Competitive Markets to prohibit the withdrawal or destruction of exhibits is denied as moot.

3. The motion (Filing Nos. 391 and 296) filed by the Organization for Competitive Markets to vacate or modify the magistrate's earlier protective order (Filing No. 25) is denied as moot.

4. The request by Seaboard to seal as confidential those portions of the trial transcript identified in its proposed order, Attachment A, is denied.

5. On the court's own motion and pursuant to paragraph nine of Filing No. 25, the parties' protective order is modified but only to the extent that testimony given in open court during the trial of this case is excluded from its coverage. The remainder of the protective order shall continue in full force and effect.

DATED this 28 day of August, 2000.

BY THE COURT:

Joseph F. Bataillon
United States District Judge

Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1661

In The

Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

Petitioner,

v.

SEABOARD FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT SEABOARD FARMS, INC.'S BRIEF IN OPPOSITION TO PETITIONER ORGANIZATION FOR COMPETITIVE MARKETS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") was correct in affirming the Order of the United States District Court for the District of Nebraska ("District Court") holding that the District Court did not abuse its discretion in denying the Motion to Intervene ("Motion to Intervene") filed after trial and settlement of the underlying action by the Organization for Competitive Markets, Inc. ("OCM") when the Motion to Intervene did not raise a single claim or defense that shared a common question of law or fact with the underlying litigation?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to SUP. CT. R. 29.6, Seaboard Farms, Inc. ("Seaboard") identifies its parent corporation, Seaboard Corporation, which is a publicly held company that owns 10% or more of Seaboard's stock. There is no other publicly held company owning 10% or more of Seaboard's stock.

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CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

The decision of the Eighth Circuit dated February 1, 2001, which OCM seeks to appeal to the Court is unreported and is set forth in OCM's Petition for a Writ of Certiorari ("OCM's Petition") at A1-A6. The Order of the Eighth Circuit dated March 20, 2001, denying OCM's petitions for rehearing *en banc* and for rehearing by the panel is also unreported and is set forth in OCM's Petition at A7. The decision of the District Court is reported at *Consolidated Nutrition Marketing Corp. v. Seaboard Farms, Inc.*, 2000 U.S. Dist. LEXIS 12526 (D. Neb. Aug. 28, 2000) and is set forth in OCM's Petition at A8-A22.

STATEMENT OF THE CASE

Background

On August 14, 1998, Consolidated filed a Complaint in the District Court alleging breach of contract, fraud and other claims against Seaboard arising from Seaboard's operation of its hog processing facility in Guymon, Oklahoma. The Complaint was publicly discussed in several agribusiness publications within a few weeks after it was filed. From the outset of the litigation, Consolidated Nutrition Marketing Corp., *et al.* ("Consolidated") sought from Seaboard confidential information and trade secrets about Seaboard's hog plant processes and proprietary business practices through disclosures and/or discovery. Seaboard refused to disclose such information without a limited protective order protecting its trade secrets and proprietary information.

On January 13, 1999, Seaboard and Consolidated agreed to, and the District Court entered, a Stipulation for Protective Order and Protective Order ("Protective Order") (Filing No. 25) to protect "certain documents, information or things which will be produced during discovery or otherwise contain[ing] sensitive and private marketing, business or other proprietary information" (OCM's Petition at A9).

Between March 6, 2000 and March 16, 2000, over one and one-half years after the Complaint was filed, the trial of the action between Seaboard and Consolidated was held. On March 16, 2000, Seaboard and Consolidated settled the case during trial.

OCM's First Expressed Interest in this Action

On June 2, 2000, seventy-eight (78) days after the trial was over and a final settlement of the case was reached, OCM, a complete stranger to the litigation, filed the Motion to Intervene seeking to materially modify the Protective Order entered by the District Court by "seeking public access to documents, evidence, information and other things currently deemed confidential" (Motion to Intervene at 1).

District Court's Ruling

After considering the Motion to Intervene and pertinent "briefs and indexes of evidence" submitted and filed by OCM and Seaboard, the District Court properly denied the Motion to Intervene (OCM's Petition at A8-9 and A21). OCM was, however, granted the right by the

District Court to inspect and review the entire transcript of the trial and OCM later posted the entire trial transcript on its website. *See* OCM's Petition at 2 ("OCM distributes reports on the issues raised in such litigation and provides public access to trial transcripts and other records from these actions. *See* <www.competitive-markets.com>").

OCM also was entitled to review numerous documents in the District Court not filed under seal as well as a great number of trial exhibits at the trial of this matter. (The Order on Final Pre-Trial Conference (Filing No. 345) identifies trial exhibit numbers 1-2174).[1] The only documents OCM was denied to inspect were a very limited number of confidential records relating to Seaboard's hog processing facility and its customers submitted in support of certain pre-trial motions filed under seal.

Eighth Circuit's Ruling on Appeal

On appeal, a three judge panel summarily affirmed the Order of the District Court holding "that the district court did not abuse its discretion in denying OCM's motion for permissive intervention because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation" (OCM's Petition at A6). The Eighth Circuit refused OCM's request for a rehearing *en banc* and for rehearing by the panel. There was no dissent to any decision in the lower courts.

---

[1] OCM did not pursue access to the trial exhibits.

REASON FOR DENYING THE WRIT

The Order of the District Court denying the Motion to Intervene – first made *after* trial and final settlement of the case – is subject to review under the abuse of discretion standard. The Eighth Circuit properly held the District Court did not abuse its discretion. No split of authority in the Courts of Appeals on this issue exists. And no other issue should be reached by the Court. This case simply presents no compelling reason for granting certiorari. Merely because one commercial business is sued by another does not mean the defendant business is stripped of its right to protect its confidential information, trade secrets and competitive processes. The Protective Order entered by the District Court protected those legitimate interests. OCM's claim to have a vital interest in this case is highly dubious. OCM's request to intervene in this action came almost *two years* after this lawsuit was publicly disclosed in the industry media which OCM claims to closely monitor. OCM's Motion to Intervene *first* came after the trial ended and a settlement was reached. No compelling interest has been shown. The District Court properly denied the Motion to Intervene and the Eighth Circuit properly affirmed the Order. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("It is uncontested . . . that the right to inspect and copy judicial records is not absolute. . . . [T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case").

I.

REVIEW IS UNWARRANTED BECAUSE THE DISTRICT COURT'S DENIAL OF THE MOTION TO INTERVENE WAS MERELY A PROPER EXERCISE OF DISCRETION

A. OCM Complains only of a Misapplication of a Rule of Law Which Is Not a Proper Basis for Granting a Writ of Certiorari

Misapplication of "a properly stated rule of law" seldom justifies review by the Court. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law"); *see also National Labor Relations Bd. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("[W]e should adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations").

OCM contends the District Court denied the Motion to Intervene "on the theory that the interest" of OCM "in obtaining access to [sealed] records does not raise a question of law or fact in common with the main action, *as is required to intervene under Rule 24(b)*" (OCM's Petition at 7) (emphasis added). OCM thus quarrels only with an alleged "misapplication of a properly stated rule of law," *i.e.*, Rule 24(b). This is not a proper basis for granting certiorari. OCM's Petition should be denied.

B. This Case Does Not Involve Unsettled Principles of Public Importance Nor Does it Involve a Real and Embarrassing Conflict of Opinion and Authority Between the Circuit Courts of Appeals

Only a case presenting an unsettled principle "of importance to the public" or a "real and embarrassing conflict of opinion" between and among the Circuit Courts of Appeals is worthy of the Court granting certiorari. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (" '[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public . . . and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals' ").

OCM's Petition raises neither. The discretion given to a trial court to enter and modify protective orders has been long standing and settled for decades if not longer. The Courts of Appeals are not in "embarrassing conflict" over this standard or its application. As will be shown below, the cases cited by OCM to "trump up" a conflict here to secure review by this Court are misplaced.

C. OCM has Made No Obvious and Exceptional Showing of Error

"[R]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10.

This Court has held even if "tension" exists in "the courts below," a petitioner still must make "an obvious and exceptional showing of error" to justify a grant of a writ of certiorari. *See Exxon Co., U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 841 (1996); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court . . . cannot undertake to review . . . courts below in the absence of a very obvious and exceptional showing of error").

"[F]ar-reaching" questions not presented with sufficient clarity do not justify the grant of certiorari. *See Mishkin v. State of New York*, 383 U.S. 502, 512-513 (1966) ("The far-reaching . . . questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision").

The District Court, after a careful review, denied OCM's Motion to Intervene. The appeal to the Eighth Circuit presented a single mundane question: Whether the District Court abused its discretion in denying the Motion to Intervene under FED. R. CIV. P. 24(b). The Eighth Circuit properly held it did not.

This Court has made clear that it will refrain from passing upon Constitutional issues "unless such adjudication is unavoidable":

> 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable'. . . . 'It is not the habit of the court to decide questions of a

> constitutional nature unless absolutely necessary to a decision of the case.'

Clinton v. Jones, 520 U.S. 681, 690 n.11 (1997).

OCM has sought to complicate and convolute the only issue (*i.e.*, whether the District Court abused its discretion) with collateral claims *unnecessary for adjudication by this Court and certainly not absolutely necessary to a decision in this case*, including claims of violation of First Amendment rights and an alleged common-law right of access to court records. These questions were unnecessary for decision by the lower courts and are not presented by the record with sufficient clarity to require or justify their decision by this Court. OCM's Petition should be denied.

D. This Court has Made Clear that a Trial Court Is Given Substantial Latitude to Decide Issues Bearing Upon the Scope and Breadth of Protective Orders

FED. R. CIV. P. 26 "confers broad discretion on the trial court" to decide the degree of protection to be afforded by a protective order. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required").

This Court has made clear "the trial court" is in the "best position" to "weigh fairly" the needs of the parties and "fashion" appropriate protective orders. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see also Degen v. United States*, 517 U.S. 820, 826 (1996).

The District Court carefully reviewed the breadth and scope of the Protective Order under Rule 26(c) and properly denied the Motion to Intervene. *See* OCM's Petition at A9-A11, and A21). The Eighth Circuit affirmed the District Court's Order without dissent.

The Eighth Circuit was correct. The District Court properly utilized its sound discretion in denying the Motion to Intervene. Review by the Court is unnecessary. OCM's Petition should be denied.

E. "Good Cause" Supports Entry of the Protective Order

OCM contends the "[P]rotective [O]rder was signed by the magistrate judge . . . despite the magistrate judge's failure to make any findings that there was 'good cause' for the protective order" as required under Rule 26(c) (OCM's Petition at 3). OCM is wrong. When the District Court entered the Protective Order it implicitly found "good cause" under Rule 26(c). *See e.g. Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 n.5 (8th Cir. 1979) ("[T]he district court entered a protective order restricting use of [plaintiff's] business information to defense counsel[.] . . . In so doing, the court implicitly conceded that any further disclosure would unduly harm [plaintiff] . . . The party requesting a protective order must initially show that the information sought to be protected is within the scope of Rule 26(c) and that he might be harmed by its disclosure"); *see also E.E.O.C. v. National Children's Ctr., Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996) ("[I]n *Seattle Times* [*Co. v. Rhinehart*], 467 U.S. 20[,] . . . the

Court considered and rejected the argument that protective orders must be supported by concrete factual showings").

The District Court carefully reviewed the record in determining whether the Motion to Intervene should be denied and specifically reviewed the circumstances under which the magistrate judge entered the Protective Order. *See e.g.* OCM's Petition at A9 n.2. The District Court did not abuse its discretion.

Although collateral to whether the District Court abused its discretion in denying the Motion to Intervene, the Protective Order was properly entered by the District Court. OCM's Petition should be denied.[2]

F. This Court Has Not Recognized a Common-Law Right of Access to the Civil Court Records Purportedly at Issue (According to OCM) in this Case

OCM argues that the "Eighth Circuit's rulings are incompatible with the decisions of this Court recognizing a common-law right of access to such records" (OCM's Petition at 10). OCM's cited case law belies its argument.

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[2] As the Third Circuit has noted, the *Manual for Complex Litigation Second* favors the use of an "umbrella" protective order approach in complex cases: "That does not mean . . . that the party seeking the protective order must necessarily demonstrate . . . in the first instance on a document-by-document basis that each item should be protected. It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad 'umbrella' protective order[.]" *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122-23 (3d Cir. 1986).

See OCM's Petition at 10 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)).

Indeed, *Nixon* explicitly states "[i]t is uncontested . . . that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. 589, 598.

OCM also mistakenly relies on *Press-Enter. Co. v. Superior Court of California, Riverside, Cty.*, 464 U.S. 501 (1984) (OCM's Petition at 10). The *Press-Enter. Co.* case concerned only whether *voir dire* in a criminal trial of a violent crime should be open to the public and the press. The *Press-Enter. Co.* holding is premised on "the broad public interest" of providing an "outlet" for emotions such as "outrage and hostility" in criminal cases. *See Press-Enter. Co.*, 464 U.S. 501, 509.

Seaboard and Consolidated's action was a civil action and did not involve any "violent crimes." The denial of the Motion to Intervene did not bear upon any cathartic public interest.

Further authority on which OCM relies only applies to limited fact patterns and do not support OCM's Petition. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) ("[This case addresses] whether a *criminal trial* itself may be closed to the public upon the unopposed request of a defendant") (emphasis added); *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 602 (1982) ("[T]rial court's order . . . that holds that [Massachusetts statute] § 16 A requires, under all circumstances, the exclusion of the press and general public

during the testimony of a minor victim in a sex-offense trial").

OCM argues that "the public also may have a First Amendment right to obtain access to court records in civil cases." *See* OCM Petition at 10 n.4. OCM is in error. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit").

OCM's attempts to "extrapolat[e] from . . . criminal cases" (*see* OCM's Petition at 11) is misguided. As Justice O'Connor has noted, criminal cases are distinguishable from civil cases and carry no "implications outside the context of criminal trials." *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611 (1982) ("In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 . . . the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is 'necessary to the enjoyment of other First Amendment rights.' . . . Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, 'it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.' . . . Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials") (O'Connor, J., concurring) (citing *Richmond Newspapers*, 448 U.S. at 575).

G. There Is No Conflict Between the District Court Decision and the Circuit Courts as Alleged by OCM

OCM contends that "[b]ecause the ruling is at odds both with the decisions of eight other circuit courts of appeals on *precisely the same issue* . . . this Court should grant review." *See* OCM's Petition at 2 (emphasis added). OCM's contention is plainly wrong. The Court of Appeals' decisions to which OCM cites (*see* OCM's Petition at 6-7) are inapposite.

The only issue that may be reviewed by this Court is whether the Eighth Circuit erred in holding the District Court did not abuse its discretion in denying the Motion to Intervene. The cases cited by OCM either: (i) support collateral issue(s); (ii) were decided on disparate factual premises; (iii) are distinguishable, or (iv) ultimately provide no support to OCM's efforts to obtain a writ of certiorari.

For example, OCM's reliance upon *In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470 (6th Cir. 1983) is puzzling. *Knoxville News-Sentinel* had nothing to do with a district court's proper use of sound discretion in denying a motion to intervene. Moreover, *Knoxville News-Sentinel*, to the extent it is applicable, forcefully undermines OCM's position and makes clear that only "extraordinary circumstances" justify the reversal of a protective order. *See In re the Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 478 (6th Cir. 1983) ("[W]e do note that the bank placed significant reliance upon the protective order. Once placed in this position, only 'extraordinary circumstances' or 'compelling need' warrant the reversal of a

protective order. . . . The particular facts of this case indicate no extraordinary circumstance or compelling need").

Stone v. University of Md. Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988) also is not applicable. In *Stone*, the Sixth Circuit rejected the district court's perfunctory order granting the parties' request to seal "the entire record." *See Stone v. University of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). Unlike *Stone*, Seaboard and Consolidated tried their case in a courtroom open to the public (including OCM) and the entire trial transcript has been publicly displayed by OCM on its website. *Stone* is clearly distinguishable.

Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988) was narrowly decided on jurisdictional grounds regarding the proper exercise of the "power" of a trial court after a case was resolved to enter an order regarding discovery. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 781 (1st Cir. 1988) ("The district court's judgment . . . was a final dismissal on the merits. . . . It left no substantive issue unresolved . . . Under these circumstances, *we think that the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery*") (emphasis added). Since OCM is not attacking the district court's "power" to enter protective orders, *Liggett* has no application.

In re "Agent Orange" Prod. Liab. Litig., 821 F.2d 139 (2d Cir. 1987) concerned a district court's authority to modify a protective order "as discovery progresse[d]." *See In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 144 (2d Cir. 1987) ("[In] support of the [protective] order, the special

master noted that it might be desirable to lift the order 'as discovery progresses and fundamental issues are resolved. . . . ' [A]ppellants were on notice virtually from the time it was issued that the district court's order might be lifted or modified"). Despite its claim of carefully monitoring litigation of agri-businesses, OCM's efforts came nearly *two years* after this litigation arose and only then it was *after* trial and settlement of the case.

Davis v. E. Baton Rouge Parish Sch. Bd., 78 F.3d 920 (5th Cir. 1996) concerned the failure of the district court to give notice of potential entry of a protective order to "news agencies" who were interested in the entry of such an order. *See Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 931 (5th Cir. 1996) Unlike *Davis*, OCM makes no complaints with respect to notice given to it or others. Indeed, OCM conspicuously avoids addressing why it failed to enter this action for nearly two years after it was publicly disclosed in industry media and then only after trial and settlement of the action.

Contrary to OCM's contention, *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) merely reaffirmed the long-standing rule that issues bearing upon confidentiality and sealing court documents is "best left to the sound discretion of the trial court." *See In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) ("[The action of the litigant] could indeed have been thought to suggest a particularly high need for confidentiality with respect to the documents remaining. What view to take was assuredly one of those matters regarding access 'best left to the sound discretion of the trial court' ").

Finally, *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) is a criminal case and necessarily invokes different rights with respect to third party access to criminal (not civil) actions. *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995) ("The subject matter . . . [of] conduct in the face of criminal elements . . . thus is such that the firm might reasonably have expected some public scrutiny").

OCM argues that "[a]ccording to the Eighth Circuit, nonparties without a stake in the underlying litigation – such as newspapers, journalists, and public interest organizations like OCM – are never permitted to intervene to challenge protective orders barring public access to judicial proceedings." *See* OCM's Petition at 8. OCM wholly misreads the Eighth Circuit's decision.

The Eighth Circuit's *ratio decidendi* stems *only* from a "review [of] the district court order denying the motion for permissive intervention for abuse of discretion" (OCM's Petition at A4). The Eighth Circuit held "the district court did not abuse its discretion because the motion did not raise a claim or defense that shared a common question of law or fact with the underlying litigation" (OCM's Petition at A6). This holding evaluated only the discretion of the district court; it did not address whether "newspapers, journalists, and public interest organizations like OCM" would **ever** be allowed to "intervene to challenge protective orders." OCM's argument is in error.

OCM's Petition should be denied.

CONCLUSION

There is no need for this Court's review. The issue of whether the District Court abused its discretion in denying the Motion to Intervene is a straight forward question that was fully and adequately considered by the Eighth Circuit without dissent. No conflict in the Courts of Appeals exists on the abuse of discretion applicable here. OCM's Petition should be denied.

Respectfully submitted,

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No. 00-1661

In the

Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,
Petitioner,

v.

SEABOARD FARMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE; AND BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS

Pursuant to Supreme Court Rule 37.2(b), *amici curiae* move the Court to allow them to file their brief in support of the petitioners, which follows this motion.

Petitioner, Organization for Competitive Markets, Inc., has consented to the filing of the attached brief. Respondent, Seaboard Farms, Inc., did not consent to the filing of the attached brief.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The American Society of Newspaper Editors is a professional organization of more than 900 persons who hold positions as directing editors of daily newspapers in the United States and Canada.

The Radio-Television News Directors Association is the world's largest professional organization devoted exclusively to electronic journalism. Formed in 1946, RTNDA's membership encompasses more than 3000 news directors, news associates, educators, and students in more than 30 countries. From its inception, RTNDA has encouraged excellence in electronic journalism.

The Society of Professional Journalists is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest.

Amici curiae, collectively, are journalists who often rely on access to court documents to report on matters of public concern. This case concerns an issue critical to the media specifically and the public in general: whether a court may cut off public access to court documents and deny an interested person the ability to challenge such a sealing order.

There is an underlying assumption in this case that the Petitioner would have some presumptive right of access to the documents at issue. However, the trial court restricted access to those documents for procedural reasons, concluding that Petitioner should not be permitted to intervene for the limited purpose of challenging a sealing order because Petitioner's interest had no fact or issue in common with the main action. The trial court ignored decades of court rulings suggesting that intervention was the appropriate procedure to challenge a sealing order, regardless of the content of the underlying suit. The court thereby effectively cut off the presumed right of access to court records and left Petitioner with no satisfactory method to challenge the sealing order. Such an outcome seems to infringe on the constitutional principles previously established by the courts.

If the Eighth Circuit decision is allowed to stand, members of the public could be denied access to court records (or court proceedings in the case of closure orders) and also be denied any procedure to seek a remedy. Such a

result is undesirable as a matter of policy and is in conflict with prior opinions of this Court requiring notice and an opportunity to be heard in cases where courts wish to limit access to court proceedings.

Given the broad ramifications of a decision in this area for First Amendment interests, *amici curiae* respectfully request that this Court grant it leave to file the attached brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Because Respondent did not consent in writing to the filing of this brief, a motion for leave to file precedes this section.

next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The present case raises important issues regarding how the public may enforce its presumptive right of access to court documents. The trial court in the underlying lawsuit has refused to let Petitioner intervene for the limited purpose of challenging a sealing order, leaving Petitioner with no satisfactory method of enforcing its presumptive right of access. Such a ruling undermines the important policies set forth by this Court in granting the public a right of access to court proceedings and documents. It is therefore imperative that this Court clarify the procedural means by which a member of the public may enforce his or her presumptive right of access to court proceedings and documents. *Amici* respectfully request that, in clarifying those procedures, this Court establish a clear rule allowing intervention in all cases for the limited purpose of challenging a sealing or closure order.

SUMMARY OF THE ARGUMENT

This Court has clearly established a presumptive right of access to criminal proceedings. Most courts have relied on such opinions of this Court to logically conclude that there is a corresponding presumptive right of access to civil proceedings and to court records on file with the clerk in any court case.

Although a court may limit access to proceedings or documents in unusual cases, courts have understood that they must consider First Amendment issues and meet rigorous constitutional standards before access is restricted. Courts have also understood that members of the public or press may intervene in any case for the limited purpose of challenging an order closing a courtroom or sealing court records. Following

prior rulings of this Court that require courts to provide the public with notice and an opportunity to be heard before limiting access to criminal proceedings, most courts agree that intervention is the best procedure for a member of the public to challenge a closure order because it provides an opportunity for the court to comply with the constitutional requirements presumed to apply.

In this case, the Eighth Circuit denied a citizen's request to intervene in a civil case for the limited purpose of challenging a sealing order, reasoning that the purported intervenor's interest had no fact or issue in common with the main action. Such ruling effectively denies the public the ability to challenge sealing orders and thereby eviscerates the presumptive right of access to court proceedings and documents, which can only be restricted after the court has provided the members of the public with notice and an opportunity to be heard on the question of their exclusion.

The right of access is meaningless if there is no mechanism for exercising that right.

ARGUMENT

I. Intervention for the limited purpose of challenging sealing orders should always be permitted to preserve the presumptive right of access to court proceedings and documents.

A. There is a well-established right of access to court proceedings and documents.

The public has a well-established right of access to criminal proceedings, and the United States Supreme Court has consistently affirmed that right. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (finding a public right of access to criminal trials); *Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596 (1982) (holding that statute mandating closure of courtrooms during minor victims' testimony was unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (reversing California state court's closure of voir dire); *Waller v. Georgia*, 467 U.S. 39 (1984) (finding closure of criminal suppression hearing to be overbroad and unconstitutional); *Press Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (finding qualified right of access to pretrial hearings, and noting that First Amendment scrutiny must be applied); and *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (closure of preliminary hearing was unconstitutional).

Other courts have uniformly applied those principles to grant the public a presumptive right of access to civil proceedings. *Publicker Industries, Inc. v. Cohen*, 733 F.2d1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Del Papa v. Steffen*, 915 P.2d 245 (Nev. 1996); *State v. Cottman Transmission*, 542 A.2d 859 (Md. App. 1988). As this Court has noted, "in some civil cases the public interest in access . . . may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

Courts have also recognized that public access to court records, such as pleadings and evidence, is equally important and should be presumed. *See, e.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) (documents filed in civil litigation should be open because secrecy insulates the participants, masks impropriety, obscures incompetence, and conceals corruption); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988) (pleadings and evidentiary documents should be open);

Matter of Continental Illinois Securities Litigation, 732 F.2d 1302 (7th Cir. 1984) (records should be open); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994) (assuming both a First Amendment and a common law right of access to civil litigation documents).

If the public has a presumptive right of access to court proceedings and documents, then there must be some procedural means for preserving that right.

B. Intervention is the best method of preserving the public right of access to court proceedings and documents.

Courts have noted only three possible methods for challenging such orders: (1) intervention in the case to which the citizen seeks access for the limited purpose of challenging the closure order; (2) a writ of mandamus to an appellate court for that jurisdiction; or (3) filing a separate lawsuit for an injunction or declaratory judgment to enforce the right of access.

Over time, the courts have concluded that intervention is the preferred method of challenging a sealing or closure order. "The courts have widely recognized that the *correct procedure for a nonparty to challenge a protective order is through intervention for that purpose.*" *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (emphasis added) (*citing Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir.1988), *cert. denied*, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989)). *See also, In re Associated Press*, 162 F.3d 503 (7th Cir. 1998) (intervention is the "most appropriate procedural mechanism" for challenging closure orders); *Hertz v. Times-World Corp.*, 528 S.E.2d 458 (Va. 2000) (holding that the press *must* move to intervene for the limited purpose of challenging a closure order rather

than seek mandamus).

Intervention is the preferred method of challenging closure orders for two reasons. First, it leaves the closure decision in the hands of the judge who is most familiar with the case and who will be directly affected by the decision. *See, e.g., News American Division v. Maryland*, 447 A.2d 1264, 1271-72 (Md. App. 1982). Second, it is the most efficient and least disruptive means for challenging a closure order, as other courts are not prematurely brought in to regulate the dispute. *Id.* at 1272.

In other words, intervention allows the trial court to make a ruling based on the facts and evidence presented to it, and with the benefit of arguments presented by all interested persons, before another court steps in to review whether that closure or sealing order was valid.

C. Supreme Court rulings imply that intervention must be permitted for the limited purpose of challenging closure or sealing orders to meet constitutional standards of scrutiny.

Allowing intervention makes the most sense based on the long-established principle that a court may not enter a closure or sealing order without first providing the public and press with notice and an opportunity to be heard. *See* C. Thomas Dienes et al., *Newsgathering and the Law* § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the litany of U.S. Supreme Court right of access decisions). "[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (*citing Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., *concurring*)). For

the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court cuts off access to court proceedings or documents. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

Furthermore, courts are prohibited from entering sealing or closure orders unless there is evidence of harm to a compelling interest and no less restrictive means to avoid such harm. If a trial court wants to limit access to court proceedings or records, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press- Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1, 13-14 (1986). One reason that this procedural component is so important is so a reviewing court can determine whether the order was properly entered." *Press-Enterprise I*, 464 U.S. 501, 510 (1984). *See also, Dow Jones & Co. v. Kaye*, 90 F. Supp. 2d 1347 (S.D. Fla. 2000) (holding that order was improper where court failed to make findings based on evidence that a order was necessary); *NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337 (Cal. 1999) (court must make rigorous findings before closure or sealing order is entered); *Montana ex rel. The Missoulian v. Montana Twenty-First Judicial District Court*, 933 P.2d 829 (Mont. 1997) (gag order improperly imposed where lower court failed to take any evidence or make any factual findings with regard to the restrictive orders); *Twohig v. Blackmer*, 918 P.2d 332 (N.M. 1996) (order may not be imposed until certain procedural requirements have been met); *Care and Protection of Edith & Others*, 659 N.E.2d 1174 (Mass. 1996) (any order must be based on detailed findings of fact and there must be a hearing to determine whether there is adequate evidence to support such findings); *State ex rel. National Broadcasting*

Company, Inc. v. Court of Common Pleas, 556 N.E.2d 1120 (Ohio 1990) (order cannot issue unless specific, on the record findings are made and representatives of the press and public are given an opportunity to be heard); *State ex rel. New Mexico Press Association v. Kaufman*, 265 P.2d 300 (N.M. 1982) (stating that restrictive orders were improper where judge failed to make any findings to support them); *State v. Clifford*, 733 N.E.2d 621 (Ohio App. 1999) (finding that a court must make a finding of necessity before closing a trial).

Thus, intervention allows the trial court to comply with the mandate that the public has an opportunity to be heard. Intervention also benefits the trial court, as all interested persons may discuss the potential harm, the evidence of such harm, and whether there are less restrictive alternatives, to ensure that any closure or sealing order is valid.

II. As a matter of policy, it is important for this Court to establish clear guidelines for the public to follow when seeking access to court records.

This Court should adopt a clear policy for both citizens and courts to understand how a concerned citizen may challenge a sealing order. *Amici* urge this Court to authorize the use of intervention for the limited purpose of challenging a sealing order.

In prior cases, this Court has noted the important policies behind a right of access to court proceedings and documents, and has ensured that those principles are not forsaken for expediency. *Amici* therefore urge this Court to continue to preserve the public's right of access to court proceedings and documents by permitting Petitioners to intervene in the underlying case and by establishing clear procedural guidelines for the courts and the public to follow when sealing orders are challenged.

CONCLUSION

Because clear procedural guidelines for challenging sealing orders need to be established, and because intervention is the best procedure to challenge such orders, *amici* respectfully urge this Court to permit petitioners to intervene in the underlying cases for the limited purpose of challenging the sealing orders.

Dated: June 1, 2001

Respectfully submitted,

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No. 00-1661

IN THE

Supreme Court of the United States

ORGANIZATION FOR COMPETITIVE MARKETS, INC.,

Petitioner,

v.

SEABOARD FARMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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1. According to Respondent, this Court should deny review because Petitioner complains about "the 'misapplication of a properly stated rule of law'" rather than about a pure error law. Opp. 5 (quoting Sup. Ct. R. 10). Respondent is mistaken.

The Eighth Circuit denied Petitioner's motion to intervene pursuant to Federal Rule of Civil Procedure 24(b) because Petitioner "failed to raise a claim or defense that shared a common question of law or fact with the underlying litigation." Pet. App. A5. Petitioner had argued that it did raise such a "common question" because it challenged a protective order entered in the underlying litigation. The Eighth Circuit rejected that argument, concluding that the requirements for intervention under Rule 24(b) are not met when "the only thing the motion for permissive intervention and the underlying litigation have in common are the materials covered by the protective order." *Id.* Under the Eighth Circuit's reading of the "commonality" requirement of Rule 24(b), all nonparties are barred from intervening for the sole purpose of challenging protective orders sealing court records.

Whether a nonparty seeking access to court records satisfies Rule 24(b)'s commonality requirement is a question of law and not a question of the proper application of an accepted legal standard. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777-778 (3d Cir. 1994) (reviewing *de novo* the question whether a proposed intervenor seeking access to court records raises a question of fact or law in common with the main action as required by Rule 24(b) because that question concerns the "correct legal standard for intervention"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). As a result of the decision in this case, and the Eighth Circuit's previous decision in *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990), nonparties without a stake in the underlying litigation — such

as members of the media and nonprofit groups like Petitioner — are denied any method by which to vindicate their common-law right of access in the Eighth Circuit. Moreover, as the panel explicitly recognized, it adopted a legal standard for intervention that departs from the standard in its sister circuits. Pet. App. A5. The split in authority on this important question of law merits this Court's review.

2. Respondent mistakenly claims that, in response to Petitioner's challenge, the district court "specifically reviewed the circumstances under which the magistrate judge entered the protective order." Opp. 10. To the contrary, because the district court denied Petitioner's motion to intervene, it denied Petitioner's motion to modify the protective order "as moot," without reaching the merits of that motion. Pet. App. A19.

The Eighth Circuit affirmed the district court's denial of Petitioner's motion to intervene, and thus also did not discuss the merits of Petitioner's challenge to the protective order. Accordingly, the legality of the protective order was never addressed by either the district court or the Eighth Circuit. Indeed, unless this Court overturns the Eighth Circuit's decision in this case, nonparties in the Eighth Circuit will never be able to obtain review of the legality of protective orders sealing court records because they will not be allowed to intervene to challenge such orders.

3. The Eighth Circuit's decision is at odds with this Court's precedent recognizing a common law right to obtain access to court records. As Respondent points out, the right to obtain access to records, like most individual rights, is "not absolute." Opp. 11 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)). However, if that right exists at all

— and its existence is not in question after this Court's decision in *Nixon* — then a procedural mechanism must also exist to allow for its vindication. Intervention pursuant to Rule 24 is the only recognized method by which nonparties can interject themselves into litigation to challenge protective orders. *See, e.g., Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1989). Respondent does not suggest any other procedural method through which nonparties can seek to challenge protective orders. Because the Eighth Circuit's decision creates an absolute procedural bar to vindication of the common-law right to obtain access court records, it conflicts with the decisions of this Court establishing such a right.

4. The Eighth Circuit recognized that its decision conflicts with decisions of its sister circuits. Pet. App. A5 (quoting and citing cases from other cases with which it disagreed). As stated in the Petition, nine circuit courts permit nonparties to intervene solely for the purpose of seeking access to court records. Pet. 6-9 & n.2 (citing cases). Respondent argues that the Eighth Circuit is not in conflict with other circuits because, in some of the cases cited in the Petition, the courts rejected the intervenor's motion to vacate the order sealing court records. Opp. 13-14. However, Respondent does not deny that the courts in each of the cited cases permitted a nonparty to intervene to challenge the protective order at issue. Accordingly, these cases squarely conflict with the Eighth Circuit's ruling that nonparties seeking to challenge protective orders fail to satisfy the requirements for intervention under Rule 24(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

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